SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 175

JOSEPH COLOMBO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioner seeks a writ of certiorari in order to review an order of the Court of Appeals of the State of New York dated October 30, 1969, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 16, 1969, which in turn reversed an order of the Supreme Court of Kings County, Criminal Term, Part I, dated July 20, 1967, and entered August 22, 1967 which dismissed the indictment charging the defendant with the crime of criminal contempt of court under Section 600, subdivision 6, of the former New York State Penal Law.

Jurisdiction

The jurisdiction of this court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth and Fourteenth Amendments to the United State Constitution.

Defendant argues that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense.

Statutes

The following are the applicable statutes:

Section 600 of the former Penal Law of the State of New York provides:

CRIMINAL CONTEMPT

> "A person who commits a contempt of court of any one of the following kinds, is guilty of a misdemeanor; Subdivision 6-Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory."

Section 601 of the former Penal Law of the State of New York provides:

PUNISHMENT FOR CRIMINAL CONTEMPT

> "A criminal act is not the less punishable as a crime, because it is also declared to be punishable as a contempt of court."

Section 602 of the former Penal Law of the State of New York provides:

"Punishment for a contempt, as prescribed in Article nineteen of the Judiciary Law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment."

Section 1938 of the former Penal Law of the State of New York provides:

PUNISHMENT WHEN DIFFERENT PENALTIES ARE PROVIDED BY DIFFERENT PROVISIONS OF LAW

"An Act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions, but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

Section 750 Judiciary Law of the State of New York provides:

POWER OF COURTS TO PUNISH FOR CRIMINAL CONTEMPTS

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Section 755 of the Judiciary Law of the State of New York provides:

"When punishment may be summary: Where the offense is committed in the immediate view and presence of the court . . . upon a trial or hearing, it may be punished summarily. . . ."

Facts

The Regular April 1964 Grand Jury, as duly extended by orders of the Supreme Court, had been conducting an investigation, since September 1965, into an alleged criminal conspiracy to commit the crimes of bribery, extortion, usury and other related crimes in the County of Kings, and the use of certain legitimate business enterprises as a cover for monies obtained from said criminal activities.

The defendant-appellant was subpoenaed to testify before said Grand Jury on October 14, 1965. Appellant after being duly sworn refused to answer any of the questions propounded to him based upon his respective Federal and State privilege against self-incrimination, and the belief that the Grand Jury inquiry was irrelevant, improper and immaterial.

Thereafter, at the request of the District Attorney of Kings County, the Grand Jury voted to grant appellant full and complete immunity pursuant to former Penal Law Section 2447. Despite the grant of full and complete immunity, the appellant persisted in asserting his privilege against self-incrimination, and continued to challenge the propriety, relevancy and materiality of the Grand Jury's investigation and questions propounded.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term Part I of the Supreme Court of the State of New York for a direction to the appellant herein to return to the Grand Jury and answer the questions propounded.

The Court conducted a hearing in open court, heard argument by counsel, and received briefs from the respective

parties. The Presiding Justice, Hon. Hyman Barshay thereafter directed all of the parties to appear on December 7, 1965 at which time the defendant was directed by the Presiding Justice to return to the Grand Jury room and answer the questions propounded. The Presiding Justice found that the Grand Jury was in fact conducting a material and relevant investigation pursuant to law, and that the questions propounded were material and relevant to the proper conduct of that investigation.

After hearing said direction of the Presiding Justice appellant herein informed the court, that his position was unchanged and that he refused to return to the Grand Jury to answer any questions.

Thereupon on December 7, 1965 the District Attorney made application and the appellant was adjudged to be in (criminal Contempt of Court pursuant to Section 750 subdivision 3 of the Judiciary Law of the State of New York, committed in the immediate view and presence of the court), and the appellant herein was sentenced to a term of thirty days in the Civil Prison in the City of New York, and a fine of $250. The proceedings were adjourned to December 15, 1965 to afford the appellant an opportunity to reconsider his refusal to obey the courts' mandate and direction to testify, and to afford the District Attorney the opportunity to prepare the commitment order.

On December 15, 1965, the position of the appellant was unchanged and the Presiding Justice signed the commitment order. The entire proceedings aforementioned were reviewed and sustained by our Appellate Courts, and certiorari was denied by the United States Supreme Court. (*Matter of Koota* v. *Colombo,* 50 Misc. 2d 583, 25 A.D. 2d 497, 17 N.Y. 2d 147; and cert. den. 384 U.S. 1001.)

While the petition for a writ of certiorari was pending in the United States Supreme Court, the stay of execution of the commitment order granted by the Appellate Courts expired, and on May 9, 1966, the Presiding Justice refused any further stay. The offer of the appellant herein, on May 9, 1965, to appear before the Grand Jury and testify was refused by the District Attorney and the appellant was committed and served his thirty day jail sentence and paid a $250 fine.

Thereafter on October 10, 1966, the Kings County Grand Jury returned an indictment against the appellant Joseph Colombo, charging him with violation of (Section 600, subdivision 6, of the former Penal Law, for contumaciously and unlawfully refusing to testify after being duly sworn).

The defendant-appellant thereafter moved to dismiss the respective indictment which motion was granted by orders of Hon. Vincent D. Damiani, a Justice of the Supreme Court of the County of Kings. The Court having stated that the District Attorney should have presented evidence to the Grand Jury of the defendant-appellant's offer to appear before the Grand Jury at the time of his surrender on May 9, 1965, pursuant to commitment order.

An appeal from the dismissal order was taken to the Appellate Division of the Supreme Court, Second Judicial Department, which on June 16, 1969, reversed the decision of the lower court. The opinion of the Appellate Division clearly recited that ". . . the evidence before the Grand Jury would, if unexplained or uncontradicted, warrant a conviction for violation of subdivision 6 of section 600 of the Penal Law of 1909 (Code Crim. Pro., sec. 251)."

People v. *Colombo*, 32 A.D. 2d 812; *People* v. *Gallo*, 32 A.D. 2d 812.

On July 7, 1969, Chief Judge Stanley Fuld of the New York Court of Appeals granted permission to appellant Joseph Colombo to appeal from the order of the Appellate Division. On October 30, 1969, the New York Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, Second Department, *People* v. *Colombo*, 25 N.Y. 2d 641, 306 N.Y.S. 2d 258. Thereafter, petitioner made a motion for reargument to the Court of Appeals. On February 26, 1970, the Court of Appeals denied the motion for reargument but amended its remittur by adding the following:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: whether the rights of defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that his fundamental constitutional rights were violated by his being twice put in jeopardy for the same offense. The Court of Appeals considered his contention and held that there was no violation of the defendant's constitutional rights."

ARGUMENT

Criminal contempt committed in the presence of the Court simultaneously constitutes an affront to the dignity and order of the Court, and an offense against the People of the State, each of which is a separate and distinct offense, punishable separately and consecutively. The double jeopardy clauses of the State and Federal constitutions do not bar prosecution for one by reason of previous punishment for the other.

In the English common law, the inherent power of courts to punish summarily for contempts committed in their presence was unquestioned. That principle became a part of the common law of this State, and constitutes the source of our early statutes upon the subject. This power stems from the duty of the courts to preserve order, to prevent the interruption of their proceedings, to maintain the respect and authority due to the court, and to prevent disorderly, contemptuous or insolent behavior. It is now embodied in Article 19 of the Judiciary Law. See: *Matter of Douglas* v. *Adel,* 269 N.Y. 144 (1935).

The purpose of permitting summary punishment for contempt, as opposed to the usual process of charge and trial, was stated by the United States Supreme Court in *In re Debs,* 158 U.S. 564 (1895), at pp. 594-595;

> " * * * The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit

> the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

The Court states its views regarding the inherent power of a court to punish for contempt as follows (158 U.S., at p. 595)

> "In *Watson* v. *Williams,* 36 Mississippi, 331, 341 it was said: The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge."

The double jeopardy clauses of the State and Federal constitutions are applicable only to prosecutions for "the same offense." However, an act of contempt is not only an offense against the dignity and good order of the court, tribunal, or legislative body affected, but may also be separately denominated as a crime, and separately punished as such, since it is also an offense against the People of the State. This dichotomy was clearly recognized by the United States Supreme Court in *Jurney* v. *Mac Cracken,* 294 U.S. 125 (1935). There a witness refused to obey a Congressional subpoena to testify and produce papers at a committee hearing. The contempt of Congress was punishable as such, and was also separately denominated as a misdemeanor under the appropriate federal statutes. While the defendant in that case was not punished for both offenses, the Court nevertheless held that punishment for one would not bar prosecution for the other. Mr. Justice Brandeis said, 294 U.S. at pp. 151-152:

> "As was said in *In re Chapmen,* supra, 'the same act may be an offense against one jurisdiction and an

> offense against another; and indictable statutory offenses may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverse intuite* and capable of standing together'."

This dichotomy between offenses was recognized in New York in *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415 (1883), where the Court said, at p. 420:

> "One who disobeys the lawful order of a court not only offends against the dignity of the particular tribunal, but also against the public law. * * * The statute contemplates that both remedies, or either may be pursued. If the court has first moved and proceeded against the offender by attachment and inflicted punishment, he may nevertheless be indicted for the same wrong, but in that event the sentence is to be affected by the previous punishment."

There are many cases replete with dicta indicating that the double jeopardy clauses of the State and Federal constitutions are not violated by the facts and law of the instant proceeding. See, e.g. *People* v. *Meaking*, 133 N.Y. 214, 225-226 (1892); *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415, 420 (1883); *Matter of Second Grand Jury* v. *Cirillo*, 16 A.D. 2d 605, 607 (2nd Dept. 1962); *Matter of Hanbury*, 160 App. Div. 662, 664-665 (2nd Dept. 1914) mot. den. 215 N.Y. 688 (1915); *Typothetae* v. *Typographical Union No. 6*, 66 Misc. 484, 485-486 (Sup. Ct. N.Y. Co. 1910) aff'd 138 App. Div. 293 (1st Dept. 1910); *Matter of Amato*, 204 Misc. 454, 458 (Supt. Ct. Richmond Co. 1953); *People ex rel. Amarante* v. *McDonnell*, 100 N.Y.S. 2d 463, 469-470 (Sup. Ct. Kings Co., 1950) not officially reported.

Typical of the views of the New York courts is the opinion in *Matter of Amato,* 204 Misc. at p. 456 *supra,* where the court said:

> "In this connection, it is to be noted that the doctrine of former jeopardy does not apply to civil proceedings to punish a witness for criminal contempt, * * * for the object and purpose of such proceedings is not only to vindicate and preserve the power, integrity and dignity of the courts, but also to compel the performance of some order or decree of the court which it is within the power of the witness to perform, or to perform a public duty which the witness is bound to perform".

The case directly in point is *Matter of Louis Marangelo* v. *Criminal Court of the City of New York, et al.,* decided February 18, 1966, 49 Misc. 2d 414, Aff'd 21 N.Y. 2d 967, no opinion April 10, 1968. In his opinion Justice Lewis J. Capozzoli stated:

> "The gravamen of petitioners' attack upon the subject informations lies in the contention, that the prosecution of each summary contemmor on a subsequent information charging criminal contempt would violate the provisions of the United States and the subjection of any person to be twice put in jeopardy 'for the same offense'. (N.Y. Const. art. I, §6; U. S. Const., 5th Amdt.; see, also, Code Crim. Proc., §9, "No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted or acquitted.")
>
> Preliminarily, the court notes that the Legislature has considered and has expressly legislated upon the very issue presently submitted for the court's determination. Section 602 of the Penal Law provides: 'Punishment for a contempt, as prescribed in article

nineteen of the judiciary law, does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment.'

Research and a careful reading of the entire record, including the records pertaining to the summary contempt proceedings compel the conclusion that the constitutional principal (double jeopardy) here invoked is inapplicable. Initially, it cannot be logically disputed that subdivision 6 of Section 600 of the Penal Law comprehends an offense against the People of the State of New York and that section 750 of the Judiciary Law embodies the inherent power of the court to punish summarily for an offense against the dignity of the Court. (See, in this connection, *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415, 419-420; *Matter of Amato*, 204 Misc. 454; *People* v. *Epstein* (Sup. Ct. N.Y. County) N.Y.L.J. Nov. 4, 1964, p. 18 col 7) Of critical significance to this determination, there emerges from the present fact pattern a clear division between these acts which constituted the basis for adjudging each petitioner a contemmor of the court, to wit, willful refusal to obey the mandate of the court, and those acts which are charged in the informations to be violative of subdivision 6 of section 600 of the Penal Law, to wit, refusal to answer questions before the Grand Jury.

For the foregoing reasons, each of the applications is denied and each petition dismissed.''

It is therefore clearly established by the decision above cited that the law of the State of New York is settled as to the defense of double jeopardy in cases such as the instant one. There is a distinct dichotomy between criminal contempt under Section 750 of the Judiciary Law of the State

of New York, and criminal contempt as a misdemeanor under Section 600 of the former Penal Law of the State of New York.

The federal courts have long held that the double jeopardy clause of the constitution is not violated by a criminal prosecution for contempt, even though the contemnor has previously been punished summarily or otherwise by the court for his contempt. In *Lewinson* v. *United States*, 278 F. 2d 421 (7th Cir. 1921), cert. den. 258 U.S. 630 (1922), the defendant was punished for contempt in violating a so-called "liquor injunction" under the Volstead Act. The court held that even though the very same act was also punishable under a criminal statute there was no violation of the double jeopardy clause. This doctrine was followed in *Urban* v. *United States*, 18 F. 2d 374 (6th Cir., 1927).

Most recently, in the Southern District of New York, the question involved in this case was squarely presented in *United States* v. *Mirra*, 220 F. Supp. 361 (U.S.D.C., S.D.N.Y. 1963). In that case, defendant Mirra had previously been on trial for his part in a narcotics smuggling conspiracy. During the course of the narcotics conspiracy trial, Mirra, while testifying, picked up the witness chair and threw it at the Assistant United States Attorney. Mirra was summarily held in contempt by the trial judge, and sentenced to one year in prison therefor. Subsequently, Mirra was indicted for the offense of assaulting a federal officer, in the performance of his duty, the indictment charging the precise act for which he had already been punished summarily. In his decision denying Mirra's motion to dismiss the indictment on double jeopardy grounds, Judge Edelstein said, 220 F. Supp. at p. 364;

> "In rejecting attempts to equate, for procedural purposes, contempt with crime, the courts have bottomed their decisions on a rationale that finds its roots in '(s)tark necessity.'"

Judge Edelstein indicated that although the views of the Supreme Court on this precise point, as set forth in *Jurney* v. *MacCracken, supra, In Re Debs, supra,* and other cases was dicta, he said, 220 F. Supp. at pp. 365-366:

> "The court finds the rationale of these dicta to be sound. It is undeniable that outrageous conduct destructive of the court's decorum can be an offense against the court's jurisdiction as well as an offense against the laws of the United States. To permit a defendant to escape the consequences of his contumacy via the Double Jeopardy route would be to countenance a state of affairs where judges could become ineffectual in restoring judicial decorum for fear that a contempt conviction would raise a constitutional bar to a subsequent prosecution of the same act."

The procedure prescribed by New York in Sections 601 and 602 of the former Penal Law is by no means unique. As demonstrated above, it has a long and respectable history in the federal courts, and it is also recognized and effectuated in many other states. In Massachusetts, for example, a conspiracy to bribe jurors may be punished as a contmept, and may also be the subject of a separate criminal prosecution. *Dolan* v. *Commonwealth*, 304 Mass. 325, 23 N.E. 2d 904 (1939). In Louisiana, a defendant who had been acquitted on a criminal charge of violating a zoning law was enjoined from such violation, and disobedience of the injunction could have resulted in contempt proceedings, without violation of the double jeopardy clause. *City of New Orleans* v. *Lafon*,

La. 61 So. 2d 270 (1952). Cf. *Nicholas* v. *Commonwealth*, 186 Va. 986, 45 S.E. 2d 305 (1947) where a defendant could have been held in contempt for violation of a "liquor injunction", and could also have been prosecuted criminally for the same act.

The extensive authorities cited above demonstrate clearly that the double jeopardy clauses of the State and Federal constitutions will not be violated by the prosecution of these petitioners for violation of Section 600 of the former Penal Law. The petitioners have the burden of sustaining the defense of double jeopardy, *Matter of Martinis* v. *Supreme Court*, 15 N.Y. 2d 240, 251 (1965), and they have failed to meet this burden. See: *Matter of Ushkowitz*, 15 N.Y. 2d 740, 350 F. 2d 788; *People ex rel Cirillo* v. *Warden*, 11 N.Y. 2d. 51.

CONCLUSION

The Petition for the Writ of Certiorari should be Denied.

Dated: Brooklyn, New York
September 17, 1970.

Respectfully submitted,

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